

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. OSH 2003-4
)	
CHARLES K. KE-A,)	DECISION NO. 9
)	
Complainant,)	FINDINGS OF FACT, CONCLUSIONS
)	OF LAW, AND ORDER
vs.)	
)	
SI-NOR, INC.,)	
)	
Respondent,)	
)	
and)	
)	
DIRECTOR, DEPARTMENT OF LABOR)	
AND INDUSTRIAL RELATIONS,)	
)	
Appellee.)	
_____)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This Occupational Safety and Health case comes before the Hawaii Labor Relations Board (Board) pursuant to a written notice of contest filed January 17, 2003 by Respondent SI-NOR, INC. (Respondent or SI-NOR). SI-NOR contests the decision and order issued December 24, 2002 by the DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director), via the Hawaii Division of Occupational Safety and Health (HIOSH), finding Respondent violated Hawaii Revised Statutes (HRS) § 396-8(e) by terminating Complainant CHARLES KE-A aka Keoni KE-A (Complainant or KE-A) for complaining about workplace violence to SI-NOR and HIOSH.

On March 17, 2002 the Board held an initial conference attended by counsel for Complainant, Respondent and the Director.¹ Pursuant to a Pretrial Order, the issues for hearing are:

¹Pursuant to a Notice of Initial Conference, the Director and Respondent filed their Pretrial Statements on March 12, 2003. Notices were sent to Complainant's counsel of record, who initially appeared at the initial and status conferences held, but withdrew as counsel prior to the commencement of the evidentiary hearing.

1. Whether Appellee Director's Findings of Discrimination Investigation issued December 24, 2002 support a violation of Hawaii Revised Statutes (HRS) § 396-8(e) by Respondent SI-NOR?
2. Whether Complainant engaged in protected activity within the meaning of HRS § 396-8?
3. If so, whether the assessment of restitution, damages and penalty proposed by the Director in the Findings of Discrimination Investigation issued December 24, 2002 are appropriate?

The discovery deadline was extended from July 1, 2003 to September 22, 2003; and the original hearing date of August 18, 2003 was continued to October 21-22, 2003. By Board Order No. 69, Second Amended Pretrial Order, the hearing was rescheduled to December 2 through 5, 2003 in order to allow the parties time to submit memoranda of law as to whether the Board may/should modify the Director's award of back pay pursuant to HRS § 396-8. The Board held a status conference on November 26, 2003 on the issue of back pay, and informed the parties that the evidentiary hearing would limit examination as to appropriateness of the back pay award when issued on December 24, 2003 by the Director.

By Board Order No. 80, Third Amended Pretrial Order issued on November 26, 2003, the trial was rescheduled from December 2, 2003 to January 5, 2004. On December 16, 2003, Complainant, by and through his attorney of record, filed a Motion to Stay Proceeding on the grounds that a civil lawsuit against Respondent alleging substantially similar factual issues covering a discriminatory discharge in violation of HRS § 396-8(e), warranted postponement pursuant to Hawaii Administrative Rules (HAR) § 12-57-11(b).

On December 23, 2003, the Director filed a Statement of No Objections to Complainant's Motion to Stay Proceedings. On December 30, 2003, Respondent filed its Memorandum in Opposition to Complainant's Motion to Stay Proceedings. On January 2, 2004, the Board held oral arguments on Complainant's motion seeking to continue the evidentiary hearing in order to pursue Complainant's federal lawsuit against Respondent based on his alleged wrongful termination scheduled to begin March 2, 2004. Finding no cause to postpone trial, and prejudice to Respondent, who objected and was prepared to proceed, the Board denied Complainant's Motion to Stay Proceedings.

At the start of trial on January 5, 2004, and over Respondent's objection, the Board granted the oral motion by James Kuwahara, Esq., to withdraw as

Complainant's attorney thereby allowing Complainant to proceed pro se. The hearing continued on January 6, 2003 for preliminary matters and continued on February 9, 10, and 11, 2004. Complainant participated as a witness, waived his right to examine witnesses and introduce evidence, and deferred to the Director to present his case. The Director and SI-NOR were both represented by counsel and given full opportunity to produce evidence, examine and cross-examine witnesses and make argument. Post hearing memoranda were filed by both the Director and Respondent on April 12, 2004.

Based on a review of the evidence and arguments submitted, the Board majority hereby makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. The Board takes administrative notice of the proceedings and evidentiary record in Case No. OSH 2003-3, Director of Labor and Industrial Relations v. Si-Nor Inc., and the Findings of Fact, Conclusions of Law and Order in Decision No. 8, issued September 10, 2004 (Decision No. 8) arising out of a health/safety complaint of workplace violence to HIOSH filed by Respondent's employee KE-A on October 4, 2002.
2. On September 30, 2002, while driving to Whitmore Village, Lionel Deguzman (Deguzman), SI-NOR'S newly hired quality control manager and KE-A's supervisor, scolded KE-A for not cleaning the hopper of his refuse truck causing it to break down. The other employees in the truck with Deguzman and KE-A, were loyal friends of KE-A – Paul H. P. Espinda, Jr., Shannon "Ikaika" Espinda, and Waika B. White (White).
3. The Board majority finds that KE-A was belligerent and aggressive in responding to Deguzman's questioning over his need to clean the hopper because KE-A did not like the manner in which Deguzman was speaking to him. The explanation KE-A gave to Deguzman was that he had something to do. Thus began a heated argument between KE-A and Deguzman during the ride to Whitmore Village. At one point, the abusive language ended when Deguzman stopped the truck, and stepped out to cool-off. When he re-entered the truck, he apologized and continued driving in relative quiet. When they arrived at Whitmore Village, KE-A went to his refuse truck and prepared to drive out to his route. Rather than driving off to his route, KE-A left his truck to confront Deguzman again. Behind the truck and out of view of White, and Shannon and Paul Espinda, KE-A pushed Deguzman against the truck. Deguzman swung his fist, hitting KE-A. Based on KE-A's statement that he was in his truck and disembarked when he saw Deguzman walking around the truck, the Board majority finds that KE-A

was the aggressor who wanted to end the problem by confronting Deguzman.² The Board majority finds the testimony of White, and Shannon and Paul Espinda that during the physical altercation Deguzman chased KE-A from around the truck, more self-serving to help their friend KE-A, than credible or reliable. The Board majority credits Deguzman in finding that KE-A baited Deguzman into a fight by pushing him first against the truck. This provoked Deguzman to swing at KE-A, who immediately ran out yelling to his friends to “call the cops.” Not wanting to get involved, White and Shannon and Paul Espinda, drove off to their routes, and Deguzman also drove off in his truck and went home for the day. He also filed a police report against KE-A.

4. On September 30, 2002, KE-A complained to the police, and SI-NOR’s project manager Ryan Hamili (Hamili) and Vice-President in Charge of Hawaii Operations, Anthony Uwakwe (Uwakwe) that Deguzman hit him twice, threatened his life, and also tried to run him down with his truck as he was leaving Whitmore Village. The Board majority credits the testimony of Deguzman, over KE-A, Shannon and Paul Espinda, and White, and finds that Deguzman swung at KE-A after KE-A pushed him against the truck, but Deguzman did not threaten KE-A’s life; did not try to run KE-A down with the truck upon exiting Whitmore Village; or threaten the Espindas or White not to say anything.
5. After filing a police report, KE-A drove to his girlfriend’s house in Kaneohe, and stopped on the way at Castle Memorial Hospital for emergency treatment. He did not obtain a work slip to excuse him from work on October 1 and 2, 2002.
6. On October 1, 2002, Deguzman returned to work. Instead of returning to work, KE-A spoke by phone with Uwakwe who assumed management’s responsibility of investigating³ the fight and deciding what action to take. Hamili informed KE-A that the matter was out of his control since Uwakwe was handling the matter. KE-A refused to meet with Uwakwe and Deguzman, but agreed to meet only with Uwakwe on October 2, 2002.

²See, Transcript (Tr.), dated February 10, 2004 (Vol. 2), pp. 313-14.

³Uwakwe was also investigating several other personnel problems such as reports of phantom employees on the payroll, but not actually performing work, overtime abuse, as well as Hamili’s noted absences from the baseyard which SI-NOR later discovered was due to the fact that he had another fulltime job.

7. On October 2, 2002, at a face-to-face meeting with Uwakwe, KE-A reported his version of the fight. According to KE-A, Uwakwe wanted to know more about why his hopper had not been cleaned. Tr. dated February 9, 2004 (Vol. 1), p. 124. The Board majority credits the testimony of Uwakwe, that when he met with KE-A on October 2, 2002, KE-A had no visible injuries to his face. He did not complain to Uwakwe of any migraine headaches, depression, or his alleged fear of Deguzman, which would prevent him from returning to work on October 3, 2002. *Id.*, pp. 221-22. Uwakwe asked KE-A to report back to work on October 3, 2002 and KE-A unequivocally agreed.
9. Sometime on October 2, 2002, after meeting with Uwakwe, KE-A “learned from [his] co-worker [Marvin] that Lionel was still working and that he had been the whole time. . . . [He] then called Tony [Uwakwe] and asked him why [he] had to return to work when Lionel was still working and nothing had been done about the situation. [Uwakwe] said: You don’t make the decision for this company. I do. And if you don’t like it, then it’s up to you. . . . He then hung up on [KE-A].” *Id.*, pp. 222-23. KE-A understood that he had to return to work under Lionel. . . . [He] didn’t want to do that. Either that or [he] got to quit. So that’s how [he] figured it to be.” *Id.*, p. 223.
10. KE-A testified that on October 3, 2002 while on his way to work, he called Hamili, who said not to come in because they were one truck short. Hamili rebutted KE-A by testifying that KE-A came to work for a couple of hours, but left because he wanted to go for medical treatment for a migraine headache. Deguzman testified that he did not see KE-A or Hamili at the baseyard on October 3, 2002. Tr. Vol. 2, p. 433. The Board majority credits neither KE-A, nor Hamili, but rather Deguzman and Uwakwe, who had arrived at the baseyard at 7:30 a.m., expecting KE-A to report to work to “make sure [he] was there when Lionel is also in the yard, just to avoid any other confrontation, and then to be able to talk to both of them together.” Instead of showing up to work, KE-A called Uwakwe and complained because Lionel had not been fired.⁴See, Tr., dated February 11, 2004 (Vol. 3), p. 556.

⁴Uwakwe testified as follows in response to his attorney’s questioning:

- Q: [by Mr. Gima] So what did Ke-a tell you specifically?
A: [by Mr. Uwakwe] He told me that he left the premises because Lionel was there and Lionel had not been fired; that he thought after my discussion with him on the 2nd, I was going to fire Lionel and that’s why he came to work. Since Lionel was there, he was not going to work.

11. On October 3, 2002, KE-A presented himself for treatment at Straub Clinic & Hospital where he obtained a work slip to remain off work from October 3, 2002 through October 7, 2002, and returned for a followup checkup on October 8, 2002. Even though Hamili informed KE-A that Uwakwe had assumed responsibility for handling the fight situation, KE-A communicated only with Hamili, regarding his whereabouts after October 3, 2002, when he did not report back to work as instructed by Uwakwe, because Deguzman had not been fired.
12. On October 4, 2002, KE-A filed a safety/health complaint with HIOSH against SI-NOR based on the fight with Deguzman on September 30, 2002. KE-A admitted that what he sought from filing the complaint was to get Deguzman fired.⁵ See, Tr. Vol. 1, pp. 231-32. The Board majority finds that after insisting that Uwakwe fire Deguzman, KE-A followed through on his threat to Uwakwe by complaining to the mainland, i.e., to SI-NOR's President Silas Ugorji (Ugorji).⁶ On October 3, 2002, KE-A deliberately refused to return to work because Deguzman had not been fired. The Board majority finds that KE-A's filing of his complaint with HIOSH on October

Q: When he called you, did he tell you that he was going to the doctor's?

A. No.

Q. Did he tell you that he had been to the doctor's?

A. No.

Based on questioning by the Board, KE-A testified as follows:

Q: [by Chair Nakamura] What did you want to happen after OSHA came?

A: [by Mr. Ke-a] Honestly I wanted Lionel fired.

Q: How about Ryan?

A: That was up to the company. He wasn't doing a very good job, but I wasn't expecting him to be fired. That's not what I was thinking. It was more towards Lionel.

⁶See, Decision No. 8, Findings of Fact No. 33. Indeed, KE-A wrote a letter dated October 2, 2002, to SI_NOR's President Ugorji documenting his complaints against Deguzman, and his dissatisfaction with Hamili and Uwakwe's handling of the situation. He summarizes his version of the fight between him and Deguzman, informing SI-NOR that Deguzman threatened to kill him; that he "made a Police report and will be pressing charges against Lionel for assault and terroristic threatening. . . .," that he had gone to the hospital and had x-rays taken of his face, and that he had gotten "little response from Ryan Hamili about the situation;" and felt that Uwakwe did not take the incident of September 30, 2002 "seriously." See, Tr. Vol. 1, p. 204.

4, 2002 was part of his scheme to get Deguzman fired and undermine SI-NOR's management authority.

13. After returning to SI-NOR's California office on October 7, 2002, Uwakwe met with Ugorji about his decision to terminate KE-A primarily for being insubordinate to Deguzman and challenging him into a verbal and physical fight over the need to clean his hopper, and for being insubordinate to Uwakwe by disobeying his instruction to return to work on October 3, 2002.⁷ In addition, Uwakwe had warnings that KE-A had been falsifying his hours of work by not showing up for work on Wednesdays and Saturdays, but receiving pay for those hours.⁸
14. On October 8, 2002, KE-A returned to work because he expected HIOSH to start its complaint inspection that was the subject of Case No. OSH 2003-3. Upon returning to work, KE-A was assigned to a crew covering the Hickam contract and supervised by SI-NOR's project manager Chad Pasoquen (Pasoquen), who was also a friend of KE-A's. This assignment was pre-arranged by Hamili.
15. On October 9, 2002, HIOSH compliance officer, Hervie Messier met with Hamili to conduct an opening conference and inspection in Case No. OSH 2003-3.
16. Also on October 9, 2002, Uwakwe called Deguzman and instructed him to terminate KE-A (Tr. Vol. 2, pp. 401-02) and which is the day the Board majority finds Deguzman issued termination notices to Brandon Sapigao (Sapigao) and Jonathan Kahananui (Kahananui). Deguzman relied on his wife to type out the disciplinary action slips to Sapigao and Kahananui on October 8, 2002, after receiving the forms from SI-NOR on October 7, 2002.⁹ Deguzman testified before the Board in both Case No. OSH 2003-3 and the instant matter, that he did not issue a termination notice to KE-A on that day because earlier that morning he had just issued termination notices to Sapigao and Kahananui, who were both angry and had threatened Deguzman and he "didn't want to get three guys pissed off at [him] in one day." Tr. Vol. 2, p. 402.¹⁰

⁷See, Tr. Vol. 3, pp. 558-61.

⁸Id., p. 584.

⁹The Board majority relies on the disciplinary action form used by Deguzman, which was faxed from SI-NOR's headquarters to Deguzman on October 7, 2002, because Deguzman had informed Uwakwe he had run out of the forms. Tr. Vol. 3, pp. 561-62.

¹⁰Based on the record in Case No. OSH 2003-3, see, Tr. Vol. 3, dated September 29, 2003, pp. 449-51 and 465, and Deguzman's testimony before the Board on February 10, 2004, the Board finds that Deguzman terminated Sapigao and Kahananui on the morning of October 9, 2002, as handwritten by Lori Deguzman on Respondent's Ex. B.

17. Since Deguzman was not the quality control manager for the Hickam contract, KE-A was not under his direct supervision after returning to work on October 8, 2002. Nevertheless, Uwakwe instructed Deguzman to terminate KE-A, because he had no confidence in Pasoquen, who was subsequently demoted from project manager back to refuse driver. Further, Uwakwe could not rely on Hamili, who, SI-NOR later learned was working a second full-time job which is why he was difficult to reach and regularly absent from the baseyard.¹¹ The Board majority finds that Deguzman was the only management personnel at the time on whom Uwakwe could rely to issue disciplinary notices.
18. Deguzman did not issue the termination notice to KE-A until October 11, 2002, after waiting a couple of days.¹² Tr. Vol. 2, pp. 415-16.

¹¹See, Tr. Vol. 3, p. 603 where Uwakwe testified:

Q: [By Member Racuya-Markrich] Why is it that Mr. Deguzman was made the messenger of your determination to terminate Charles Ke-a and not Ryan Hamili or Chad Pasoquen?

A: [By Mr. Uwakwe] Chad Pasoquen was just appointed at that time and Chad Pasoquen wasn't really doing his duties at that point.

Ryan Hamili was a person that should have done that, but we don't get hold of Ryan. Ryan was working elsewhere at that time but we didn't know it. He returns his calls later in the evening. If you need something to be done, you don't get him all day. So only option I had was Lionel Deguzman, supervisor.

¹²While in the course of his testimony Deguzman was confused about the exact dates, he remained consistent and reliable in remembering that he received a phone call from Uwakwe to terminate KE-A on the same day he had terminated Sapigao and Kahananui, but waited a couple of days before issuing the termination notice to KE-A on October 11, 2002. Tr. Vol. 2, pp. 408-09; 415-16.

After repeated questioning about the exact dates, Deguzman testified as follows:

A: [By Mr. Deguzman] I don't know what's the date.

Q: [By Mr. Gima] And it was that day Tony called you and told you to fire Ke-a, correct, same day? You

Deguzman testified that in a phone call with Uwakwe about KE-A's termination Uwakwe was upset at KE-A for "making some problems. . . . About going to OSHA and labor board and all that." Tr. Vol. 2, p. 411. While the Board majority credits Deguzman, his testimony is unclear as to when this conversation occurred. Nevertheless, based on the record,¹³ it is reasonable to infer that it probably occurred in a phone conversation with Uwakwe on or about October 10, 2002, after Uwakwe was notified by Hamili¹⁴ Tr. Vol. 3, pp. 532-33. and the

know that because you were afraid to go back to the yard?

A: Yeah.

Q: That's how you testified before and that's how you are testifying today, right?

A: Yes, it was on the same day. Dates, I don't know, but, yeah, it was on same day. He didn't get fired till like couple days after.

Q: So there was a couple-day delay?

A: Yeah.

¹³In Case No. OSH 2003-3, Deguzman testified that he spoke with Uwakwe by phone both "before and after" he issued on October 11, 2002 the termination notice to KE-A. See, Case No. OSH 2003-3, Tr. Vol. 3, p. 460.

¹⁴Hamili testified about notifying Uwakwe as follows:

Q: [By Member Racuya-Markrich] Mr. Hamili, I'm interested to know when you first learned from Charles Ke-a that he had filed a safety complaint with HIOSH.

A: [By Mr. Hamili] I guess it would be when Hervie Messier came to our yard. He didn't say specifically who filed a complaint. He just said there was a complaint filed.

Q: And he gave you a copy of that complaint at the opening conference?

A: I don't remember.

Q: When you learned that he did file a complaint with HIOSH, when did you notify Tony Uwakwe?

A: Probably had to have been the next day because I had to show him what he had given me, what forms he had left for me.

Q: The day after the inspector came in?

A: I believe so.

Q: And you would have informed him how, by phone or by fax?

HIOSH compliance officer, Hervie Messier, of the complaint-based inspection on workplace violence that began on October 9, 2002 in Case No. OSH 2003-3 filed by KE-A on October 4, 2002. See, Tr. Vol. 3, pp. 532-33; Tr. Vol. 2, p. 315.

19. On October 11, 2002, Deguzman issued the termination notice to KE-A stating his reasons as follows:

No show for work on Wed. 10/02/02, thurs. 10/03/02, Fri. 10/04/02, Sat. 10/05/02, Mon. 10/07/02. Refuses to work with me (Lionel). Carries himself with a very insubordinate attitude towards me (Lionel), intending to provoke physical confrontation at the work site. I, Lionel (supervisor) is unable to tell Keoni what he needs to do or where he needs to go when something needs to be done or when he is needed to help the others because of his insubordinate attitude towards me (Lionel). Keoni does not work on Wednesdays and Saturdays. Why? I don't know.¹⁵

Director's Ex. B-4.

-
- A: By phone, I talked to him, and then I believe it was the next day I sent up the documents that Hervie gave me or that paper with the listing of what he expected to have.
- Q: In any conversation with Charles Ke-a before the inspector came in, did Ke-a – do you remember whether Ke-a had mentioned to you that he had gone to HIOSH and that you needed to be at the inspection site because the inspector was coming in the next day?
- A: Yes. I remember now. He told me – I think it was in the morning he had called me and told me there was going to be an inspector coming to the yard. Yes, I remember that now.
- Q: But you didn't inform – did you then inform Tony at that point, or did you wait until the inspector came in?
- A: I don't know for sure. I mean it was a close period of time because it was first thing in the morning Hervie came. I think it was after I spoke to him is when I spoke to Tony.

¹⁵Deguzman testified that this write-up that included days for which KE-A did not show up for work was his doing, and not Uwakwe's idea. Tr. Vol. 2, pp. 437-39.

20. On October 11, 2002, only after he was terminated by Deguzman, KE-A faxed to SI-NOR a copy of Dr. Kubo's work slip excusing him from work from October 3, 2002 to October 8, 2002, and filed this discrimination complaint with HIOSH. Based on the testimony that Hamili was not at SI-NOR's baseyard on a daily basis to oversee the operations and assignment of crews, which had been left to Deguzman, and Hamili's working a second full time job, the Board majority does not find credible KE-A's testimony that he gave the work slip from Dr. Kubo excusing him from work from October 3 to 8, 2002, to Hamili upon returning to work on October 8, 2002, nor Hamili's testimony that he received the work slip from KE-A and faxed it to SI-NOR's headquarters when he returned to work.
21. On December 24, 2002, Respondent SI-NOR was cited for violating HRS § 396-8(e),¹⁶ "which occurred because of participation in a safety and health protected activity by Mr. Charles Ke-a, the complainant." Based on a discrimination investigation conducted by HIOSH¹⁷ finding

¹⁶HRS § 396-8(e), provides in part:

(e) Discharge or discrimination against employees for exercising any right under this chapter is prohibited. In consideration of this prohibition:

* * *

- (4) Any employee who believes that there has been a discharge or discrimination against the employee by any person in violation of this subsection may, within sixty days after the violation occurs, file a complaint with the director alleging unlawful discharge or discrimination and setting forth the circumstances thereof; . . .

¹⁷The discrimination investigation conducted by HIOSH investigator Tin Shao Ching, found that:

- (a) Complainant engaged in a protected activity when he complained to Mr. Ryan Hamili, Mr. Anthong (sic) Uwakwe, and you [Silas Ugorji] as well as HIOSH, regarding violence in the workplace.
- (b) Mr. Hamili, Manager of the Hawaii operation, admitted that he allowed Mr. Ke-a to be off work on October 2, 2002 when he met with Mr. Anthony Uwakwe, the Vice President of the company, and that he did not expect Mr. Ke-a to return to work for the week following the altercation incident with Mr. Deguzman.

that SI-NOR terminated KE-A on October 11, 2002 for engaging in protected activity when he complained to Hamili, Uwakwe, Ugorji, and HIOSH about violence in the workplace that occurred in a physical altercation between Complainant and Deguzman on September 30, 2002.

22. HIOSH ordered Respondent to make restitution to Complainant including:

(1) Restitution with back pay at the rate of \$17.46 per hour, 40 hours per week (less normal payroll deductions), from October 11, 2002 through October 29, 2002, and back pay at the rate of \$2.46 per hour, 40 hours per week (less normal payroll deductions), from October 30, 2002 through December 25, 2002. Mr. Ke-a shall also receive

He also admitted that he received Mr. Ke-a's doctor's note on October 8, 2002 on the day of Mr. Ke-a's return to work covering the period from October 3, 2002 to October 8, 2002.

- (c) Management showed animus when Mr. Deguzman terminated Mr. Ke-a for not showing up at work on the days Mr. Hamili had excused Mr. Ke-a from work.
- (d) Reprisal was shown when Mr. Deguzman terminated Mr. Ke-a for the days he had been excused and not expected to be at work by Mr. Hamili. Mr. Deguzman claimed Mr. Ke-a was terminated for not showing up to work on October 2, 2002 and October 3-8, 2002, but Mr. Deguzman failed to communicate with other members of management to verify that Mr. Ke-a's absence was unexpected. The fact that management team members did not communicate to each other was not the employee's problem, and Mr. Ke-a should not be punished for management's failure. Furthermore, Mr. Deguzman stated Mr. Ke-a did not work on Wednesday and Saturday from the day he started to work for SI-NOR Inc. and that was four months ago. Mr. Deguzman stated he told Mr. Uwakwe three months ago about this. Management took no action against him until after he made the complaint to management and HIOSH regarding workplace violence.
- (e) Timing for Mr. Ke-a's termination was two days after HIOSH conducted a complaint inspection at the workplace regarding a workplace violence complaint. See, Director's Ex. B-2.

back pay of \$15.75 hours of overtime per a pay period for the same time frame at the rate of 1.5 times normal pay rate (less normal payroll deductions). Full back pay restitution is due and payable within twenty (20) calendar days of receipt of this order;

(2) Posting of Notice to Employees in the work area for convenient access and review by SI-NOR Inc. employees for a period of sixty (60) days;

(3) Clear personnel and other company records of any unfavorable references or entries related to this cited section 8(e) violation; and

(4) Payment of \$1,000 for violating HRS 396(8)(e) payable within twenty (20) calendar days of receipt of this order.

23. On or about January 17, 2002, Respondent timely appealed the Director's discrimination findings and order.
24. The Board majority finds that KE-A had no respect for Deguzman and never acknowledged Deguzman as his supervisor. As far as KE-A was concerned, his only boss whom he recognized and answered to was his high school friend and SI-NOR's project manager, Hamili.¹⁸ Before Deguzman began working with SI-NOR, Hamili had allowed KE-A to be off work on Wednesdays and Saturdays with pay for a period of time. When this continued after Deguzman was hired in September of 2002, Deguzman reported it to Uwakwe.
25. The Board majority credits Deguzman's testimony that KE-A had an insubordinate attitude toward him, which is summarized in the disciplinary action form issued to KE-A by Deguzman on October 11, 2002, as follows:

¹⁸See Tr. Vol. 1, p. 166. On cross examination, KE-A testified as follows:

Q. [By Mr. Gima] So when Tony is in town, isn't Tony the boss?

A. [By Mr. Ke-a] Not that I know of. I mean only person we ever answered to was Ryan ever.

[KE-A] Carries himself with a very insubordinate attitude towards me (Lionel), intending to provoke physical confrontation at the work site. I, Lionel (supervisor) is unable to tell Keoni what he needs to do or where he needs to go when something needs to be done or when he is needed to help the others because of his insubordinate attitude.

Director's Ex. B-4.

26. Deguzman's write up terminating KE-A was based on his supervision over him, and not the reasons given by Uwakwe when he ordered Deguzman to terminate KE-A on October 9, 2003. Nevertheless, Uwakwe's determination that KE-A was insubordinate is consistent with Deguzman's reports and supported by the record. Deguzman had never received from KE-A or Hamili the work slip from Dr. Kubo, excusing him from work from October 3, 2002 to October 7, 2002. Tr. Vol. 2, pp. 437-39. The Board majority credits Deguzman's testimony that had he been given the doctor's note from KE-A, he would not have written him up for not showing up to work on those days. Tr. Vol. 2, p. 438. The Board majority finds, therefore, that Deguzman and Uwakwe's reasons for terminating KE-A, based on his insubordinate conduct and animus toward Deguzman, was probably more true than false, and not because of animus or reprisal for filing his complaint of workplace violence.
27. The Board majority finds that even if Uwakwe was upset with KE-A for filing a complaint of workplace violence with HIOSH, it was not a substantial factor. On December 7, 2002, Uwakwe had discussed with Ugorji his decision to terminate KE-A for being insubordinate to Deguzman, as well as to Uwakwe. Uwakwe instructed Deguzman to terminate KE-A on October 9, 2002, on the same day HIOSH began its opening conference with Hamili. The testimony of Hamili and the HIOSH CO is consistent, that both notified Uwakwe of the complaint of workplace violence on October 10, 2002. Given the choice between KE-A, with his defiant and insubordinate attitude versus Deguzman, whom the Board majority finds was doing his best to enforce the work rules, regulate time cards and discipline an unruly workforce, SI-NOR had a legitimate business reason for terminating KE-A.¹⁹ Hence, the Board majority is not convinced that KE-A's exercise of protected activity, i.e., complaints to SI-NOR and HIOSH about workplace

¹⁹See, Tr. Vol. 3, pp. 558-61.

violence, was a substantial factor, in Respondent's decision to terminate Complainant, or that insubordination was a pretext for discrimination.

DISCUSSION

The issues in the instant contest filed by Respondent are: 1) whether Appellee Director's Findings of Discrimination Investigation issued December 24, 2002 support a violation of HRS § 396-8(e)²⁰ by Respondent SI-NOR; and 2) whether Complainant engaged in protected activity within the meaning of HRS § 396-8?

The burden of proof is the Director's and/or Complainant's to establish by a preponderance of evidence²¹ a prima facie case of discrimination.²² In reviewing

²⁰The purpose of the Hawaii Occupational Safety and Health Law, Chapter 396, HRS, is to encourage employee efforts at reducing injury and disease arising out of the workplace and to prevent retaliatory measures taken against those employees who exercise these rights.

HRS § 396-8 provides, in part:

(e) Discharge or discrimination against employees for exercising any right under this chapter is prohibited. In consideration of this prohibition:

* * *

- (3) No person shall discharge or in any manner discriminate against any employee because the employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or intends to testify in any such proceeding, or acting to exercise or exercised on behalf of the employee or others any right afforded by this chapter;

²¹The Director/Complainant has the burden of proof as well as the burden of persuasion. The degree or quantum of proof is by a preponderance of evidence. HRS § 91-10(5). The preponderance of the evidence has been defined as "that quantum of evidence which is sufficient to convince the trier-of-fact that the facts asserted by a proponent are more probably true than false." Ultimate Distribution Systems, Inc., 1982 OSHD § 26.011 (1982).

²²"Proof of a prima facie case of retaliatory discharge requires a showing that (1) plaintiff engaged in a protected activity, (2) the employer subjected her to an adverse employment action, and (3) a causal link exists between the protected activity and the

claims in which there are proffered competing rationales for adverse employment action following a complaint or other exercise of protected activity, the Board has adopted the standard applicable to discrimination claims in the federal courts:

Courts have adopted the shifting burden of proof application in pretext cases to Section 11(c) retaliation claims. The Secretary bears the initial burden of demonstrating: (1) that an employee engaged in protected activity, (2) that the employee suffered an adverse employment action, and (3) that there was a causal nexus between the protected activity and the adverse action. Causation may be inferred from circumstantial evidence. The burden then shifts to the employer to proffer a permissive, nondiscriminatory reason for the employment action. Finally, the Secretary must demonstrate that the employer's reason is merely a pretext for discrimination.

Rabinowitz, Occupational Safety and Health Law, 1999 Cumulative Supplement, 400 (BNA Books 1999) (footnotes omitted.)

In the instant complaint, Respondent does not dispute that the Director's proof of a prima facie case has been met. The Board majority agrees. First, after the September 30, 2002 altercation with Deguzman, KE-A engaged in protected activity when he complained about Deguzman to Ugorji, Uwakwe and Hamili, and filed a complaint with HIOSH on October 4, 2002, against SI-NOR about violence in the workplace. Second, on October 9, 2002, HIOSH began its complaint based inspection with Hamili, who at the time was SI-NOR's project manager and agent in charge of overseeing operations in Hawaii. On October 10, 2002, both Hamili and the HIOSH compliance officer, informed Uwakwe about the complaint. On October 11, 2002, KE-A was terminated by Deguzman, who he claimed was a safety hazard and caused the violence in the workplace. Based on these facts, the Board majority concludes the Director has established, albeit minimally, a prima facie case of discrimination.

Having established a prima facie case of discrimination, the burden shifts to Respondent "to articulate a legitimate, nonretaliatory explanation for its

adverse employment action. (Citation omitted.) Like disparate treatment claims, the evidence necessary to establish a prima facie case of retaliatory discharge is minimal. (Citation omitted.) A plaintiff may satisfy the first two elements by demonstrating that she was fired, demoted, transferred or subjected to some other adverse action after engaging in protected activity. The causal link may be inferred from circumstantial evidence such as the employer's knowledge that the plaintiff engaged in protected activity and the proximity in time between the protected action and the allegedly retaliatory employment decision." Marcia Linville v. State of Hawaii, et al., 874 F.Supp 1095, 1110 (D. Haw. 1994).

decision.” See, Jim Skellington, Case No. OSAB 97-015 (2001).²³ Respondent contends that Complainant was terminated for being insubordinate to Deguzman, which provoked the fight on September 30, 2002, and also insubordinate to Uwakwe, when he did not return to work on October 3, 2002, after agreeing to do so. Respondent also contends that KE-A’s engagement in alleged protected activity was fabricated and part of a scheme to get Deguzman terminated. Furthermore, Respondent argues that KE-A was included in a subsequent investigation for overtime and time card abuse, and would have been terminated by SI-NOR in any event. See, Decision No. 2, Kay Miura, Case No. OSAB 2002-16.²⁴ The Board majority is persuaded that the Employer’s proffered reasons for terminating KE-A are more probably true, than false.

First, the Board majority is convinced that KE-A harbored more hate than fear of Deguzman because Deguzman was hired by SI-NOR to bring discipline to an unruly workforce that took advantage of the fact that there was no meaningful management authority in place since the start of operations in Hawaii. Complainant had no respect for Deguzman and had never acknowledged him as his supervisor. As

²³In Jim Skellington, *supra*, the Board stated:

[O]nce the plaintiff establishes a prima facie case of discrimination, the burden of production shifts to defendant to articulate a legitimate, nonretaliatory explanation for its decision. If the defendant carries this burden satisfactorily, the burden shifts back to the plaintiff to show that the alleged explanation is a pretext for impermissible retaliation.

²⁴In Decision No. 2, Kay Miura, Case No. OSAB 2002-16, dated October 4, 2002, the Board stated that respondent’s burden was to show that it would have reached the same decision even in the absence of the protected conduct.

Assuming arguendo, a prima facie case of discrimination the burden shifts to Respondent “to articulate a legitimate, nonretaliatory explanation for its decision.” Similar, the Director asserts assuming arguendo the protected activity was a substantial factor in the Respondent’s decision to terminate Complainant, then the burden shifts to the employer to establish by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. Marshall v. Commonwealth Aquarium, 469 F. Supp. 690, 692 (Mass. 1979). If the [Respondent] carries this burden satisfactorily, the burden shifts back to the [Director/Complainant] to show that the alleged explanation is a pretext for impermissible retaliation.” Marcia Linville v. State of Hawaii, et al., 874 F.Supp. 1095, 1110 (D.Haw. 1994).

far as KE-A was concerned, the only boss he recognized and answered to was his high school friend and SI-NOR'S project manager, Hamili. Before Deguzman began working with SI-NOR, Hamili had allowed KE-A to be off of work on Wednesdays and Saturdays with pay for a period of time. When this continued after Deguzman was hired in September of 2002, Deguzman reported it to Uwakwe, since neither was apprised by Hamili. Then on September 30, 2002, Complainant was belligerent and aggressive, and baited Deguzman into the fight.

Second, the Board majority is convinced that KE-A's exercise of protected activity was part of his scheme to get Deguzman fired and undermine SI-NOR's management authority. KE-A admitted that what he sought from filing the complaint with HIOSH was to get Deguzman fired, but not necessarily his friend Hamili. When Uwakwe refused to fire Deguzman, KE-A followed through on his threat by complaining to SI-NOR's President Silas Ugorji. Thereafter, on October 3, 2002, KE-A deliberately refused to return to work because Deguzman had not been fired. In what appears to be his last ditch effort to get Deguzman fired, KE-A filed his complaint with HIOSH on October 4, 2002. On this basis, and given the choice between Complainant, with his defiant and insubordinate attitude versus Deguzman, who was doing his best to enforce the work rules, regulate time cards and discipline an unruly workforce, the Board majority finds that SI-NOR had a legitimate business reason for terminating KE-A.

The Board majority credits Deguzman's testimony that KE-A had an insubordinate attitude toward him, and finds that KE-A deliberately refused to report to work on October 3, 2002. These findings are more persuasive than KE-A's testimony and exercise of protected activity claiming that Deguzman posed a safety hazard to the workplace.

Third, the Board majority finds that even if Uwakwe was upset with KE-A for filing a complaint of workplace violence with HIOSH, it was not a substantial factor in the decision to terminate him. On December 7, 2002, Uwakwe had discussed with Ugorji his decision to terminate KE-A for being insubordinate to Deguzman, as well as to Uwakwe. Uwakwe first instructed Deguzman to terminate KE-A on October 9, 2002, on the same day HIOSH began its opening conference with Hamili. The testimony of Hamili and the HIOSH CO is consistent, that both notified Uwakwe of the complaint of workplace violence on October 10, 2002. Hence, the Board majority is not convinced that KE-A's exercise of protected activity, i.e., complaints to SI-NOR and HIOSH about workplace violence, was a substantial factor in Respondent's decision to terminate Complainant.

Finally, the Board majority concludes that the Director failed to prove that SI-NOR's explanation for terminating Complainant was a pretext for discrimination.

Deguzman's write up terminating KE-A was based on his supervision over him, and not the reasons given by Uwakwe when he ordered Deguzman to terminate KE-A on October 9, 2003. Nevertheless, Uwakwe's determination that KE-A was insubordinate is consistent with Deguzman's reports and supported by the record. Deguzman had never received from KE-A or Hamili the work slip from Dr. Kubo, excusing him from work from October 3, 2002 to October 7, 2002. Tr. Vol. 2, p. 437-39. The Board majority credits Deguzman's testimony that had he been given the doctor's note from KE-A, he would not have written him up for not showing up to work on those days. Tr. Vol. 2, p. 438. Nevertheless, KE-A's insubordinate conduct to Deguzman and Uwakwe is more probably true than false. Therefore, the Board majority finds that KE-A's termination was not because of animus or reprisal for filing his complaint of workplace violence.

Based on the foregoing, the Board majority concludes that Respondent did not unlawfully terminate Complainant in violation of HRS § 396-8(e).

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant contest pursuant to HRS § 396-11.
2. Although the Director and Complainant established, albeit minimally, a prima facie case for discrimination, the Board majority concludes that Respondent proved by a preponderance of evidence that it had a legitimate business reason for terminating Complainant for his acts of insubordination.
3. The Director and Complainant failed to prove by a preponderance of evidence that Complainant's exercise of protected activity, i.e., complaints of workplace violence in the form of its newly hired supervisor, was a substantial factor in Respondent's decision to terminate Complainant on October 11, 2002.
4. The Director and Complainant failed to prove by a preponderance of evidence that Respondent's proffered reasons for terminating Complainant, i.e., Complainant's insubordinate attitude and deliberate refusal to work on October 3, 2002, were a pretext for complaining to HIOSH about workplace violence.
5. The Board majority concludes that Respondent did not violate HRS § 396-8(e) by terminating Complainant for complaining about workplace violence to Respondent or after filing a complaint of workplace violence with HIOSH.

ORDER

The Director's decision, dated December 24, 2002 is reversed in accordance with the foregoing and the corresponding backpay award and penalty assessed against SI-NOR are vacated.

DATED: Honolulu, Hawaii, October 26, 2004.

HAWAII LABOR RELATIONS BOARD

/s/
BRIAN K. NAKAMURA, Chair

/s/
KATHLEEN RACUYA-MARKRICH, Member

DISSENTING OPINION

I dissent from the decision of the majority of the Board to deny the claim of CHARLE KE-A (KE-A) in his Occupational and Safety case against SI-NOR. In my evaluation of the testimony, KE-A was more credible in his testimony of the incident that led up to the claim than Deguzman. In addition, insufficient weight was given to KE-A's worker's compensation claim which was reported to Hamili. Further, after considering the total confusion of Hamili's status as KE-A's supervisor versus Deguzman, KE-A's HIOSH complaint, Deguzman's testimony as to Uwakwe's reasons for KE-A's termination, Deguzman's documentation of KE-A's termination, the inconsistencies in Uwakwe's rationale for terminating KE-A, and the timing of all of the events leading to KE-A's termination I am led to conclude that KE-A was terminated for filing a complaint with HIOSH and worker's compensation claim. Thus, I would have found that KE-A was terminated for filing both a HIOSH complaint as well as a worker's compensation claim and would have found for KE-A in this case.

/s/
CHESTER C. KUNITAKE, Member

NOTICE TO EMPLOYER

You are required to post a copy of this Order at or near where citations under the Hawaii Occupational Safety and Health Law are posted. Further, you are required to furnish a copy of this Order to a duly recognized representative of the employees.

Copies sent to:

Charles K. Ke-a
J. Gerard Lam, Deputy Attorney General
Preston A. Gima, Esq.